

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA**

MINUTE ORDER

DATE: 05/16/2016

TIME: 08:20:00 AM

DEPT: 43

JUDICIAL OFFICER PRESIDING: Kevin DeNoce

CLERK: Tiffany Froedge

REPORTER/ERM: Lucretia Haering

CASE NO: **56-2014-00461060-CU-NP-VTA**

CASE TITLE: **P.Q.L Inc vs Revolution Lighting Technologies Inc**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Non-PI/PD/WD tort - Other

EVENT TYPE: Motion - Other (CLM) for an Order Enforcing Business Records Subpoena

MOVING PARTY: P.Q.L Inc

CAUSAL DOCUMENT/DATE FILED: Motion - Other for an Order Enforcing Business Records Subpoena Over Written Objections and ofr Monetary Sanctions Declaration of David Y Yoshida Esq in support thereof, 03/29/2016

EVENT TYPE: Motion to Compel on behalf of deft

MOVING PARTY: Revolution Lighting Technologies Inc a Delaware Corporation, Charles J Schaffer, Seesmart Inc, Tri State LED Inc

CAUSAL DOCUMENT/DATE FILED: Motion to Compel Pltf to Serve Further Resp and Produce Docs Responsive to Req for Production of Documents Set 2 and Req for Monetary Sanctins in the Amount of 3220.00 Memo of Ps and As and Decl of Nicholas Kanter in Support Thereof, 04/11/2016

EVENT TYPE: Motion to Compel further responses to discovery

MOVING PARTY: P.Q.L Inc

CAUSAL DOCUMENT/DATE FILED: Motion to Compel further responses to discovery. MPAs & declaration of T Randolph Catanese in support thereof, 12/31/2015

APPEARANCES

Nicholas Kanter, counsel, present for Defendant,Cross - Defendant(s).

T Randolph Catanese, counsel, present for Cross - Defendant,Cross - Complainant,Plaintiff(s).

David Y. Yoshida, counsel for Plaintiff PQL Inc

At 9:30 a.m., court convenes in this matter with all parties present as previously indicated.

Counsel have received and read the court's written tentative ruling.

Matter submitted to the Court with argument.

The Court finds/orders:

The court's ruling is as follows:

Grant the Defendant's Motion to Compel Further Responses to the Request for Production of Documents (Set Two). Further responses due by June 1, 2016. Sanctions are ordered in the amount of \$2,000, payable within 30 days.

Discussion:

Chronology.

3/3/16: PQL made a written settlement demand on defendants. Enclosed with the demand was a report prepared by Dr. Barbara C. Luna. (A copy of Dr. Luna's report, along with Pl's settlement demand has been filed under seal pursuant to CRC Rule 2.551, and Paragraph 6 of the May 13, 2015 Protective Order.)

3/25/16: Revolution served Request No. 116 (the request at issue in this motion) on Plaintiff.

3/29/16: Plaintiff responded to Request No. 116.

(See Declaration of Nicholas Kanter in support of motion, ¶¶ 1-4; Ex. A-B.)

Separate Statement – Demand at Issue.

Request No. 116 – asks Plaintiff to produce "All DOCUMENTS YOU provided to Dr. Barbara C. Luna in connection with the preliminary calculation of damages Dr. Luna prepared in the instant matter." PQL's responded by objecting on the following grounds:

Evidence Code 1152 – all documents provided to Dr. Luna for her preliminary calculation of damages are privileged under Section 1152 b/c they constitute evidence furnished, in compromise, to a party that will sustain damages or claims that it will sustain loss of damage.

Attorney-client privilege –Here, Dr. Luna is a consulting expert as opposed to a testifying expert. Accordingly, all communications or documents exchanged by and between Dr. Luna and responding party for any purpose, including the preparation of reports, are protected by the attorney-client privilege. (See Ev. Code 952; *Roush v. Seagate Technology, LLC* (2007) 150 Cal.App.4th 210, 255; *Deluca v. State Fish Co., Inc.* (2013) 217 Cal.App.4th 671, 688.)

Attorney-work product. A consulting expert's report, prepared at the attorney's request and with the purpose of assisting the attorney in trial preparation, constitutes work produce (*Willaimson v. Superior Court* (1978) 21 Cal.3d 829, 834.) Such reports are entitled to conditional protection and barred from discovery in the absence of good cause. (*Kizer v. Sulnick* (1988) 202 Cal.App.3d 431, 440.) Here, Dr. Luna is a consulting expert as opposed to a testifying expert. Therefore, all expert reports prepared by Dr. Luna, and any communications or documents responding party provided to Dr. Luna to prepare the reports, are protected by the attorney-work produce privilege.

Evidence code 1152, 1154.

Evidence Code §§ 1152 and 1154 are each directed at the admissibility of evidence, not its discovery. (See *Volkswagon of America, Inc. v. Superior Court* (2006) 129 Cal.App.4th 1481, 1490-91.) Also, sections 1152 and 1154 are not absolute bars to admissibility, since a settlement document may be admissible for a purpose other than proving liability. (*Volkswagon*, 139 Cal.App.4th 1491.) The Court overrules the objection made per Ev. Code 1152/1154.

Attorney-client privilege and Attorney-work product privilege.

Pl's counsel voluntarily provided Dr. Luna's report to Pl's litigation adversaries, including Revolution. It would seem, then, that any privilege that may have protected the report itself (which is not at issue here) AND the documents upon which the report was based (which ARE at issue here) was waived when the report of Dr. Luna was provided to defendants in this action, including Revolution. The information upon which the report is based and explicitly references is not protected by the attorney-client or attorney-work produce privileges:

- The calculations on pages 4 and 7 of the report are based on "historical sales data . . ." and Plaintiffs "internally prepared income statements." (See Revolution's Notice of Lodging the Dr. Luna Report and Ex. B attached to Nicholas Kanter's declaration in support thereof.) This information is not privileged and does not become privileged merely b/c it was sent to Dr. Luna to prepare her report.
- Estimates fro PQL management (Luna Report, p. 2-3, note 1, p.4, note 5);
- Estimated probability of bids on projects resulting in contracts for PQL per PQL management (Luna Report, p. 2-3, note 2);
- Customers that PQL bid on and that def's allegedly used proprietary information to bid on as well (Luna Report, p. 4, note 1).

The sources of the Dr. Luna report comprise data originating from Plaintiff. Plaintiff has not shown how the underlying source data is privileged under the attorney-client privilege or constitutes work product. The data does not become privileged b/c its attorney purportedly transmitted this data to Dr. Luna. (See Opposition, page 2.) Counsel for Plaintiff concedes that this data originated from Plaintiff. In his declaration, Mr. Yoshida states that Dr. Luna's report was based on "confidential information regarding PQL's operations and finances," "historical sales data, estimated data and data from internally prepared income statements." (Yoshida declaration, ¶¶ 7-8.) While Mr. Yoshida claims he "aggregated and synthesized" some of the information Pl provided to him before transmitting it to Dr. Luna, that would not transform raw data into privileged information protected from disclosure. (See *Nalian Truck Lines, Inc. v. Nakano Warehouse & Transportation Corp.* (1992) 6 Cal.App.4th 1256, 1265 – "[A] communication which was not privileged to begin with may not be made so by subsequent delivery to the attorney.")

Relevance. The records are highly relevant to Pl's claims and the defs' defenses. Pl contends the reports supports its damages claim "in excess of \$5,000,000.000 in year one, with a cumulative financial injury in excess of \$18,000,000.00 after three years. (*Id.* at page 6.) Facts and docs supporting this damages claim are certainly relevant, and discoverable. Plaintiff proffered the opinion of Dr. Luna to claim it suffered millions of dollars in damages. By putting the opinion at issue, Dr. Luna "ceased to be merely a consultant and has become a counter in the litigation" subject to pretrial discovery. (*DeLuca* at 689-90; see also, *Mize v. Atchson* (1975) 46 Cal.App.3d 436, where the court held that the plaintiff waived its attorney work produce privilege by allowing its investigator to testify about the contents of the investigator's file containing attorney work product.) In the present case, Pl is suing defs for monetary damages. Dr. Luna's report purports to provide evidentiary support for Pl's alleged damages. Pl cannot now refuse to produce the information comprising its damage claim, and at the same time be permitted to introduce such information at trial. Such result would severely prejudice defs' ability to prepare their defense.

Motion to Compel further responses to discovery continued to 05/19/2016 at 08:20 AM in department 43.

Motion - Other (CLM) for an Order Enforcing Business Records Subpoena continued to 05/19/2016 at 08:20 AM in department 43.

Parties waive notice.